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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1702

W. HORACE LOWDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not render a written opinion. The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 492 F.2d 953.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1974. A timely petition for rehearing was denied on March 15, 1974. By order dated April 3, 1974, Mr. Chief Justice Burger extended the time for filing a petition for a writ of certiorari to

and including May 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a conspiracy to defraud the United States in violation of 18 U.S.C. 371 by impeding and obstructing the functions of the Internal Revenue Service in ascertaining and collecting income taxes is governed by the five-year statute of limitations of 18 U.S.C. 3282 or the six-year statute of limitations provided by 26 U.S.C. 6531(1).

2. Whether such a conspiracy existed between petitioner and six corporations controlled by him, where he was the sole human being involved in planning the fraudulent shifting of income among the corporations.

3. Whether the net worth method of computing understatements of income was properly applied in this case.

STATUTES INVOLVED

The pertinent provisions of 18 U.S.C. 371 and 3282, and 26 U.S.C. 6531 and 7206(1), are set forth at pp. 3–5 of the petition.

STATEMENT

After a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of (1) willfully conspiring with six family corporations to defraud the United States by impeding and obstructing the functions of the Internal Revenue Service in ascertaining and collecting the income taxes of the corporations for certain fiscal years between 1961 and 1965, in violation of 18 U.S.C. 371; and (2) willfully making and signing the

corporate income tax returns of All Star Hatcheries, Inc. (one of the six corporations), for its taxable years ended May 31, 1965, and May 31, 1966, which he did not believe to be true and correct as to every material matter, in violation of Section 7206(1) of the Internal Revenue Code of 1954, 26 U.S.C. 7206(1) (two counts). Petitioner was sentenced to concurrent two-year prison terms on each of the three counts; he was fined $10,000 on the conspiracy count and $5,000 on each of the other counts.

The evidence showed that petitioner utilized his intimate connection with six family-owned corporations [1] to foster a scheme whereby their tax liability would be evaded. Petitioner was the active manager of the affairs of each corporation, was in charge of the overall business and financial operations for all, including bookkeeping, and signed each of the corporate tax returns. He did not dispute that he was responsible for the practices alleged to have constituted a scheme to cover up the tax liability of the corporations. These practices consisted mainly of engaging in substantial numbers of inter-corporate transactions. During one four-year period approximately $17 million was transferred by checks running from each corporation at the end of its respective taxable year to one of the five others, the taxable year of which terminated at a later time; some $5 million of this amount was attributable to loans extended or loans repaid, and the remaining $12 million was reflected as

[1] All Star Mills, Inc., Lowder Farms, Inc., All Star Hatcheries, Inc., All Star Foods, Inc., All Star Industries, Inc., and Consolidated Industries, Inc.

expenses on the books of the paying corporations. The government's proof showed that these amounts were mere transfers of money, fraudulently treated as deductible expenses for goods and services to avoid reporting a profit.

ARGUMENT

1. The principal question raised by the petition (Pet. 9–13) is whether prosecution of the conspiracy count was barred by the five-year statute of limitations of 18 U.S.C. 3282 or was timely under the six-year statute prescribed by 26 U.S.C. 6531(1). The former provision states: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

However, Section 6531(1) provides that "[n]o person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner." Because the last of the 18 overt acts (all of which were corporate income tax return filings) alleged in the conspiracy count occurred on March 14, 1966, petitioner contends that his indictment on October 8, 1971, was

barred by the five-year statute of limitations of 18 U.S.C. 3282.[2]

As we show in the ensuing discussion, the issue involves the interpretation of various decisions of this Court rendered between 25 and 50 years ago and is not entirely free from doubt. Although the court of appeals' opinion does not address itself to several of the precedents of this Court that we believe must be interpreted in reaching a resolution of the issue,[3] we believe the court was correct in reaching the result that the six-year period of limitations is applicable.

Moreover, we think that the issue (whether the applicable statute of limitations for a conspiracy to defraud the United States of taxes is five or six years) clearly is not sufficiently important at this time to warrant plenary review by this Court. Apart from the decision below, we have found no other reported opinion by a court of appeals dealing with the question. The Internal Revenue Service generally seeks to develop tax fraud conspiracy cases within the five-

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[2] With respect to the first substantive count (alleging the filing of a false corporate income tax return on August 14, 1965), the six-year statute of limitations was extended pursuant to 26 U.S.C. 6531 for an additional nine months by the filing of a complaint prior to August 13, 1971.

[3] Petitioner, a non-lawyer, appeared *pro se* in the courts below. Although he did raise the statute of limitations issue in the district court (Tr. 655) and in the court of appeals, he did not advance the specific statutory arguments set forth in the petition. Thus, while the government brought the authorities cited in the petition to the attention of the court of appeals, it is understandable that the court of appeals did not expressly deal with them in its opinion.

year period if possible, or, alternatively, charges a conspiracy to evade or defeat taxes (*i.e.*, to violate 26 U.S.C. 7201), which charge is clearly governed by the six-year period of limitations (26 U.S.C. 6531(8)). Thus, it is rare for an indictment to be brought respecting which this issue is pertinent. Moreover, there is relatively little at stake for this petitioner, since he received concurrent prison sentences on the conspiracy and the substantive counts, his only additional punishment for the conspiracy conviction being a fine of $10,000.

Accordingly, if this Court is not satisfied on the basis of the papers before it that the petition for certiorari should be denied, we believe it would be preferable to remand to the court of appeals for further consideration.

a. The court of appeals concluded (Pet. App. 5a–6a) that the six-year statute of limitations was applicable. Petitioner urges that the decision below is in conflict with *Grunewald* v. *United States*, 353 U.S. 391; *United States* v. *Klein*, 247 F. 2d 908, 912 (C.A. 2), certiorari denied, 355 U.S. 924; and *United States* v. *Witt*, 215 F. 2d 580, 584 (C.A. 2), certiorari denied *sub nom. Talanker* v. *United States*, 348 U.S. 887. In those cases, however, the applicability of the longer statute of limitations of 26 U.S.C. 6531(1) was not raised by the government. As a result, it was assumed that the governing statute of limitations was the shorter period of 18 U.S.C. 3282. Thus, those decisions cannot be said to conflict with this case, because the question as to which period of limitations was applicable was not presented or decided in those cases.

b. However, apart from the alleged conflict, petitioner presents a statutory argument in support of his claim that the five-year statute of limitations of 18 U.S.C. 3282 is applicable to the conspiracy count. Citing the prefatory language of Section 6531—"offenses arising under the internal revenue laws"—petitioner contends (Pet. 10–12) that Section 6531(1) governs only when the conspiracy is itself a violation of the internal revenue laws. Since he contends that the conspiracy charged, "to defraud the United States," did not "arise" under the internal revenue laws, petitioner urges that Section 6531 can have no application.

Although the matter is not entirely free from doubt, we believe that the decision of the court of appeals is correct. Its holding is supported by the language of Section 6531(1), which extends the six-year statute of limitations to "offenses involving the defrauding or attempting to defraud the United States or any agency thereof, *whether by conspiracy or not,* and in any manner" (emphasis supplied). If this statutory language were the only matter to be considered, the decision below would seem clearly correct, for petitioner's conspiracy offense falls squarely within the words of the provision.

However, some doubt is created regarding this reading of the pertinent statutory provisions by this Court's decision in *United States* v. *McElvain,* 272 U.S. 633, and by the structure of Section 6531, neither of which was dealt with in the opinion of the court of appeals.[4] As Section 6531 is now written, only

[4] See note 3, *supra.*

subsection (8) deals expressly with the period of limitations applicable to a conspiracy charge under 18 U.S.C. 371. It provides that the six-year period of limitations governs a conspiracy the object of which is to "attempt in any manner to evade or defeat any tax or the payment thereof"—*i.e.*, a conspiracy to violate 26 U.S.C. 7201.[5] Petitioner argues (Pet. 11) that this provision would be surplusage if subsection (1) were construed, as the government sought to do in *McElvain*, to encompass conspiracies to violate the tax laws, and accordingly the only tax conspiracy subject to the longer period of limitations of Section 6531 is a conspiracy to violate Section 7201. However, the history of subsection (8) does not support such a conclusion. It was added, along with subsections (2) and (3) of Section 6531, in specific response to the decision of this Court in *United States* v. *Scharton*, 285 U.S. 518, and was merely intended to insure the applicability of the longer period of limitations to all offenses, substantive or conspiratorial, involving attempts to evade or defeat taxes. See H. Conf. Rep. No. 1492, 72d Cong., 1st Sess., p. 29. This enactment clearly carried with it no implication one way or the other regarding the possible application of Section 6531(1) to any tax conspiracies.

In the *McElvain* case, McElvain and his co-defendants were indicted for conspiracy to defraud the United States by making false tax returns. In ruling that the statute of limitations barred their prosecu-

[5] Compare Section 6531(7), which extends the statute of limitations to six years for offenses under Section 7214(a), including the conspiracy described in Section 7214(a)(4).

tion, the Court stated two propositions that arguably relate to the issue in this case:

(1) The Court held that a conspiracy to violate the internal revenue laws is not an offense "arising under the internal revenue laws" (272 U.S. at 638) and that therefore the limitations provisions contained in those laws (the predecessors of Section 6531) would be inapplicable to such a conspiracy charge. It is therefore arguable that a conspiracy charged under the criminal code is subject to the general statute of limitations of Title 18, rather than the special limitations provisions of the internal revenue laws, except to the extent that the latter specifically provide otherwise.

(2) Having held that the conspiracy charged in *McElvain* did not arise under the internal revenue laws, the Court next turned to a consideration of the general limitations provisions then in effect for criminal cases, Section 1044 of the Revised Statutes. A three-year statute of limitations was there imposed, but with a proviso substituting a six-year period for "offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner * * *." This language is identical to the language of subsection (1) of Section 6531, which the courts below found to establish a six-year period of limitations. The government contended in *McElvain* that, since the object of a conspiracy to violate the tax laws necessarily encompassed an attempt to defraud the United States of its tax revenues, the proviso was applicable. But the Court rejected this argument, finding that the

language of the proviso applied only to *substantive* offenses involving defrauding and did not apply to conspiracies to commit such offenses (272 U.S. at 639). Such a holding, if applicable to the instant case, permits the argument that present Section 6531(1) does not, despite the language "whether by conspiracy or not," ever apply to a charge of conspiracy. Since petitioner was charged with conspiring to defraud the United States rather than to evade or defeat taxes, one could argue from *McElvain* that the conspiracy count of his indictment would be barred by the five-year statute of limitations generally applicable to conspiracies.

Despite the foregoing, there are indications in the *McElvain* opinion itself that it was not meant to apply to the situation presented by the current Section 6531(1) involved in this case. Although the Court did first state in *McElvain* that the conspiracy charged was not an offense "arising under the internal revenue laws" (272 U.S. at 638), it also observed that the proviso to Section 1044 did not apply because "[a]ll the various offenses under the internal revenue laws are excepted from § 1044" (*id.* at 639). Moreover, the Court referred to Section 1010(a) of the Revenue Act of 1924, which was enacted after the offense committed by McElvain, and which further included the proviso in the revenue statutes. With respect to this subsequent legislation, the predecessor to Section 6531(1), the Court stated "[a]nd § 1010(a) which prescribes for them [such revenue offenses] the same limitations as are fixed by the proviso, was unnecessary if the proviso already applied" (*ibid.*). Thus, *McElvain*

supports, as much as it negates, the conclusion that, had the defendant there committed the offense after the inclusion of the proviso in the internal revenue statutes (as did petitioner), the six-year statute would have been applicable.*

Moreover, the Court's subsequent decision in *United States* v. *Grainger*, 346 U.S. 235, reached a result (albeit without discussion) contrary to the implication in *McElvain* that the proviso does not apply to conspiracy offenses. The issue in *Grainger* involved the applicability of the World War II Suspension of Limitations Act, which contained language virtually identical to Section 6531(1), to both a substantive offense under the False Claims Act and a conspiracy to commit that substantive offense. After holding that the longer statute of limitations applied to the substantive offense, the Court stated that "[t]he same reasoning applies to a conspiracy to make false claims * * *," which also was at issue in the case. 346 U.S. at 244. Given this holding in *Grainger*, we believe it is now the law, notwithstanding *McElvain*, that the words "whether by conspiracy or not" in Section 6531(1) would encompass petitioner's conspiracy to defraud the United States by filing false tax returns. But cf. *Braverman* v. *United States*, 317 U.S. 49, 54.

c. In any event, contrary to petitioner's argument (Pet. 14, n. 4), a reversal of the conspiracy conviction

* This understanding of *McElvain* is reinforced by the observation of Judge Learned Hand in *Falter* v. *United States*, 23 F. 2d 420, 426 (C.A. 2), that "The fraud was neither an incident nor the purpose of the crime, as in *U.S.* v. *Worcek*, 271 U.S. 201, nor an offense against the revenue laws, as in *U.S.* v. *McElvain*, 271 U.S. 653."

would not require a new trial on the other counts of the indictment. The mere use of the term "conspiracy," without the introduction of incriminating evidence unrelated to the substantive accusations, could not contribute to petitioner's conviction on substantive counts "by blackening [him] with the general guilt." Cf. *United States* v. *Bentvena*, 319 F. 2d 916, 955 (C.A. 2) (concurring opinion). Petitioner has made no specific showing that the existence of the conspiracy count resulted in the introduction of evidence that would have otherwise been excludable or that it in any manner had a "substantial and injurious effect." Cf. *Kotteakos* v. *United States*, 328 U.S. 750, 776. See *Schaffer* v. *United States*, 362 U.S. 511, 516–517. Nor can petitioner make such a showing, in view of the district court's careful charge to the jury as follows (Tr. 1010):

> As you have noted, a separate crime or offense is charged in each count of the indictment, three in number. Each offense, and the evidence applicable thereto, should be considered separately. The fact that you may find the defendant guilty or not guilty of one of the offenses charged should not control your verdict with respect to the other offenses charged.

2. Even if the conspiracy conviction is not barred by the statute of limitations, petitioner alternatively argues (Pet. 13–14) that because he was the "sole human conspirator" involved in planning the evasion of the taxes of his controlled corporations, there could be no conspiracy between himself and these corporations. In support of this contention, he urges that

Union Pacific Coal Co. v. *United States,* 173 Fed. 737, 744–745 (C.A. 8), and *United States* v. *Carroll,* 144 F. Supp. 939, 942 (S.D. N.Y.), affirmed on other issues *sub nom. United States* v. *Sheba Bracelets,* 248 F. 2d 134 (C.A. 2), certiorari denied, 355 U.S. 904, are in conflict with the decision below. This question was not raised in the lower courts. Absent exceptional circumstances, there is ample precedent for this Court declining to consider the question at this stage of the proceeding. See, *e.g., Lawn* v. *United States,* 355 U.S. 339, 362, n. 16; *Duignan* v. *United States,* 274 U.S. 195, 200; *Husty* v. *United States,* 282 U.S. 694, 701–702. Cf. *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 412.

With respect to the merits of petitioner's argument, it is well settled that a corporation, acting through its agent, can be a party to a conspiracy. See, *e.g., Direct Sales Co.* v. *United States,* 319 U.S. 703. However, the authorities cited by petitioner hold that an agent of a corporation cannot conspire with his corporation, without the knowledge or participation of any other agent or officer of the corporation. See also *Poller* v. *Columbia Broadcasting,* 368 U.S. 464, 469; *Nelson Radio & Supply Co.* v. *Motorola,* 200 F. 2d 911, 914 (C.A. 5); and Note, *Developments in the Law—Criminal Conspiracy,* 72 Harv. L. Rev. 920, 951–953 (1959). On the other hand, at least one court has suggested that a conspiracy can exist where a single person acts as agent for two corporations. Under this analysis, which would be applicable to petitioner and his six controlled corporations, the corporate agent is deemed to occupy several different

roles. See *Cape Cod Food Products* v. *National Cranberry Ass'n*, 119 F. Supp. 900, 909 (D. Mass.). This rationale arguably extends the conspiracy doctrine beyond its traditional underlying assumption that collective action toward an antisocial end involves a greater risk to society than individual action toward the same end.

It is possible, however, that the manipulation of corporate entities by a single person in furtherance of economic crimes such as tax evasion or price fixing represents a modern analogue to the collective human conduct that is the basis of the classic definition of conspiracy. The combination of separate corporate entities, acting through their several human agents and with a common agent, may provide the plurality of actors traditionally required to prove a conspiracy. But we do acknowledge there is considerable merit to the argument that where, as in this case, one or more corporations and a single human agent are the only parties to an alleged conspiracy, the requisite plurality for a conspiracy is lacking. If the Court does not remand the case for reconsideration of the statute of limitations issue, and if it chooses to reach petitioner's alternative contention that he was the "sole human conspirator," it would appear that the most appropriate disposition would be a remand to the court of appeals in order that it may have an opportunity to consider and pass upon the issue.[7]

3. Finally, petitioner argues (Pet. 15) that the net worth method was improperly used to establish un-

[7] Such disposition, of course, would affect only the conspiracy count and would leave the convictions on the substantive counts undisturbed.

reported income with respect to Count II, which alleged that he had made and subscribed a false income tax return for All Star Hatcheries Inc., for its taxable year ended May 31, 1965. As part of the proof, the government introduced a four-calendar-year net worth computation for each corporation, which was designed to eliminate the confusion engendered by petitioner's scheme of "rolling" expense deductions near the end of each corporate taxable year in order to transfer otherwise reportable income from one corporation to another at the end of the "transferor's" taxable year. Since the net worth increases for All Star Hatcheries, Inc. were on a calendar year basis, they were then converted on the computation by monthly pro-ration to reflect taxable year increases as of each May 31st, Hatcheries' closing date. Thus, 7/12 of the 1964 net worth increase of Hatcheries was added to 5/12 of the 1965 net worth increase to arrive at a 12-month fiscal year net worth increase of $151,372.44, compared with the reported figure of $39,815.44. In view of this unusual situation, there is nothing improper about the use of the net worth method. Indeed, as the court of appeals stated in its opinion, upon which we rely (Pet. App. 8a):

> Having examined the exhibits and retraced the computations, we cannot accept Lowder's claim that this derivation should not have been admissible as proof of understatement. As we understand his brief, his objection amounts to a claim that the government cannot cut through the complexity of the apparent scheme to the substance of corporations' financial activities. The net worth

method was most appropriate in this case where the gross figures appearing on the books and transferred to the tax returns were suspect and the underlying documentation was unavailable. See *Johnson* v. *United States,* 325 F. 2d 709 (1 Cir., 1963). More specifically, since utilization of the different fiscal year dates was apparently an integral part of the scheme to "roll" income to avoid taxation, we think the government was properly allowed to pierce the surface by its pro-rata derivation. *Holland* v. *United States,* 348 U.S. 121, 131 (1954).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied, or, if the Court deems it appropriate, granted with respect to the conspiracy conviction and remanded to the court of appeals for reconsideration. The petition should otherwise be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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